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No. 01-400

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICKY BELL, Warden,

Petitioner,

vs.

GARY BRADFORD CONE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In a case where counsel makes strategic choices (1) not to present additional mitigating evidence in the penalty phase, cumulative to the evidence already before the jury, and (2) not to make a closing argument, when that strategy precludes the prosecution from making an effective argument:

1. Does the general rule of *Strickland* v. *Washington* apply, requiring a showing of prejudice for relief on an ineffective assistance claim, or is prejudice presumed?

2. Was a "presumed" answer to Question 1 "clearly established" within the meaning of 28 U. S. C. § 2254(d)(1) as of 1988?

3. Was the state court's application of *Strickland* to the facts of this case reasonable, within the meaning of 28 U. S. C. § 2254(d)(1)?

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Holland v. Illinois, 493 U. S. 474, 107 L. Ed. 2d 905, 110 S. Ct. 803 (1990) 14

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Parke v. Raley, 506 U. S. 20, 121 L. Ed. 2d 391,
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Penry v. Johnson, 532 U. S. 782, 150 L. Ed. 2d 9,
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Sawyer v. Smith, 497 U. S. 227, 111 L. Ed. 2d 193,
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Smith v. Robbins, 528 U. S. 259, 145 L. Ed. 2d 756,
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Steel Co. v. Citizens For Better Environment, 523 U. S. 83,
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United States v. Lanier, 520 U. S. 259, 137 L. Ed. 2d 432,
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United States v. Leon, 468 U. S. 897, 82 L. Ed. 2d 677,
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Watt v. Alaska, 451 U. S. 259, 68 L. Ed. 2d 80,
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Weeks v. Angelone, 528 U. S. 225, 145 L. Ed. 2d 727,
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Williams v. Matesanz, 230 F. 3d 421 (CA1 2000) 23

Williams v. Taylor, 529 U. S. 362, 146 L. Ed. 2d 389,
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R. Rotunda & J. Nowak, Treatise on Constitutional Law (2d ed. 1999) 10

Miscellaneous

141 Cong. Rec. (1995) 6, 8, 11, 21, 22

Black's Law Dictionary (7th ed. 1999) 20

Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998) 7, 8, 11,20, 23

K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform (1995), http://www.cjlf.org/publctns/Overdue/ODCover.htm 11

S. O'Connor, Local Control of Crime, Address to the Attorney General's Crime Summit (Mar. 4. 1991), reprinted in Habeas Corpus Issues: Hearings before the House Subcommittee on Civil and Constitutional Rights, Serial No. 39, 102d Cong., 1st Sess. (1991) 11

U. S. Dept. of Justice, Bureau of Justice Statistics, Prisoner Petitions Filed in U. S. District Courts, 2000, with Trends 1980-2000 (NCJ 189430 2001) 9

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the proper interpretation of Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if properly implemented, will greatly reduce unnecessary delay in

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

the enforcement of capital punishment and reduce the number of correct criminal judgments erroneously overturned on federal habeas. These changes would advance the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On August 10, 1980, Gary Cone murdered Shipley O. Todd, age 93, and his wife Cleopatra Todd, age 79. *State* v. *Cone*, 665 S. W. 2d 87, 89-90 (Tenn. 1984). Over *twenty-one years* later, justice remains on hold, even though Cone's identity as the perpetrator has never been in doubt. See *id.*, at 90.

This senseless and brutal crime was the culmination of a series of crimes in which Cone endangered and injured numerous people. First, he robbed a jewelry store. Then he led police on a high-speed chase through mid-town Memphis and into a residential neighborhood. Then he shot a police officer. Then he shot a civilian, John Clark, who challenged him. Then he carjacked a car. Even though the owner of that car fled, Cone tried to shoot him as well. Fortunately, he was out of ammunition. He drew a pistol on Lucille Tuech when she refused to let him into her apartment. *Ibid.*

Cone broke into the Todds' home, beat them to death, and ransacked the house. He used the proceeds of this crime to make his escape to Florida. *Ibid.*

Cone made a mental defense in the guilt phase. The jury rejected it based on contrary expert testimony and evidence contradicting the factual basis of Cone's experts' diagnosis. *Id.*, at 91-92. Cone was sentenced to death, *id.*, at 90, and the Tennessee Supreme Court affirmed on direct appeal. *Id.*, at 92.

The state then provided extensive post-conviction review. The trial court held an evidentiary hearing to consider Cone's claims, including his ineffective assistance claim. Among other contentions, he claimed it was ineffective for trial counsel not to introduce mitigating evidence in the penalty phase and to

waive oral argument. See Findings of Fact and Conclusions of Law 4, J. A. 82.

The trial court credited the testimony of defense counsel that the additional testimony of family members "was contradictory and generally not helpful." *Id.*, at 5, J. A. 84. His strategy had been to get the mitigation evidence in during the guilt phase. *Ibid.* As noted *supra*, defense counsel did introduce the mental defense evidence in that phase. The court further credited the testimony of defense counsel that waiver of closing argument was a strategic choice, which precluded a final argument by a prosecutor with a "reputation for devastating closing arguments." *Ibid.* Applying *Strickland* v. *Washington*, 466 U. S. 668 (1984) and *Darden* v. *Wainwright*, 477 U. S. 168 (1986), the court found that counsel's performance was not deficient. *Id.*, at 5-6, J. A. 84. The state intermediate appellate court affirmed on similar reasoning, noting in addition, "the finding of guilt and the imposition of the death penalty were based upon the facts and the law—not by shortcomings of counsel." *Cone* v. *State*, 747 S. W. 2d 353, 357-358 (Tenn. Crim. App. 1987).

Extended litigation over a successive petition followed, ultimately concluding in a decision that all the claims in it were either previously determined or defaulted. *Cone* v. *State*, 927 S. W. 2d 579, 580, 582 (Tenn. Crim. App. 1995), cert. denied, 519 U. S. 934 (1996).

Cone filed the present petition in Federal District Court on July 1, 1997. *Cone* v. *Bell*, 243 F. 3d 961, 966 (CA6 2001). The District Court denied the writ and denied a certificate of appealability in an extensive opinion. The District Court agreed with the state courts that counsel had made a strategic decision not to introduce evidence he believed would hurt more than help, that the available mitigating evidence had been introduced in the guilt phase, and that there is no reasonable probability that the evidence not introduced would have changed the result. App. to Pet. for Cert. 77-80. Regarding waiver of closing argument, the District Court noted that the

prosecutor's closing remarks dealt only with the undisputed existence of aggravating circumstances, rather than an effective argument for the death penalty. Trial counsel therefore had a tactical basis for waiving argument and thereby precluding the prosecution's rebuttal, where he expected a far more effective argument to be made. Further, the District Court concluded that the state court's application of the law to the facts was reasonable. App. to Pet. for Cert. 81.

On appeal, the Sixth Circuit "reject[ed] out of hand" the unanimous conclusion of all the state and federal jurists who had examined the case to that point, that counsel had made a strategic choice. 243 F. 3d, at 979. The court found that a presumption of prejudice was raised and that "Cone need not show actual prejudice." *Ibid.*

On December 10, 2001, this Court granted the state's petition for certiorari.

SUMMARY OF ARGUMENT

The statute at the center of this case, 28 U. S. C. § 2254(d), was the centerpiece of the habeas reform portion of the Antiterrorism and Effective Death Penalty Act of 1996. It should be interpreted and applied in a way that will achieve the objectives of Congress: to speed up the processing of habeas cases and to greatly reduce, if not eliminate, the erroneous nullification of correct state judgments by the federal district and circuit courts.

The question of whether § 2254(d) bars habeas relief should be decided as a threshold matter, at the same time as any retroactivity question. In most cases, this resolution will make it unnecessary to address the underlying claim, reducing the delay in habeas cases.

The "unreasonable application" prong of a § 2254(d)(1) analysis need only consider whether the state court's application of the law to the facts reached a reasonable result. There

is no need to inquire whether the state court was reasonable in extending or not extending Supreme Court precedent to a new context. That issue is included in the analysis of what rule of law is "clearly established."

The state courts in the present case correctly recognized and applied the two-part test of *Strickland* v. *Washington*, including its requirement that the habeas petitioner affirmatively show prejudice. The Sixth Circuit's rule of presumed prejudice in the context of the present case is not "clearly established"; the contrary rule is clearly established.

Under the "unreasonable application" prong of § 2254(d)(1), the state court decision should stand if the outcome of applying the law to the facts of the case is "susceptible to debate among reasonable minds," the standard from *Butler* v. *McKellar*. This standard is consistent not only with the *Teague* line of cases, but also the qualified immunity cases and *United States* v. *Leon*. It is consistent with the interpretation of *Williams* v. *Taylor*, emphasizing the objective nature of the test but otherwise accepting it as a *Teague*-like inquiry.

ARGUMENT

I. The AEDPA should be construed and applied to simplify and streamline the resolution of habeas corpus cases.

The present case calls for the application of 28 U. S. C. § 2254(d).

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly estab-

lished Federal law, as determined by the Supreme Court of the United States; or

"(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

The Senate sponsor of the habeas reform portion of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (AEDPA), called this the "single most important provision contained in the habeas reform proposal." See 141 Cong. Rec. 15,062, col. 3 (1995) (statement of Sen. Hatch). Within the limits of statutory language and binding precedent, the AEDPA should be construed and applied in a way to further its purpose.

The central purpose is abundantly clear from the debates. It is to expedite the resolution of habeas corpus petitions, particularly in capital cases. The supporters of reform invariably bolstered their arguments with horror stories of unconscionable delays. See *id.*, at 14,734 (statement of Sen. Feinstein); *id.*, at 15,062 (statement of Sen. Hatch); *id.*, at 15,019 (statement of Sen. Specter); *id.*, at 15,036-15,037 (statement of Sen. Nickles). Any interpretation which further delays, rather than expedites, habeas cases would be contrary to the clear purpose of the AEDPA.

In his argument for the new standard, Senator Hatch tied it specifically to this purpose:

"After all, State courts are constrained to uphold the Constitution and faithfully apply Federal law as well. There is simply no reason that Federal courts should have the ability to *virtually retry* cases that have been properly adjudicated by our State courts. There is no reason to allow Federal courts to do that." *Id.*, at 15,062 (emphasis added).

The provision's primary sponsor saw it as not only a limitation on relief but also as a limitation on relitigation. This is a rule about respecting the outcome of a previous adjudication, in the same category as res judicata and law of the case.

See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 946 (1998); see also *id.*, at 911-917. A substantial part of its value lies in protecting the party who has already prevailed on the merits from the burden and delay of having to litigate those merits over again. It is not enough for that party to win the second battle over the same turf; in most cases he should not have to fight the second battle at all.

A second purpose of this provision is to protect correct state court judgments from erroneous nullification. The problem is illustrated by the history of the Kentucky recidivist sentencing cases. In *Dunn* v. *Commonwealth*, 703 S. W. 2d 874, 876 (1985), the Kentucky Supreme Court considered the perennial problem of habitual criminals attacking the validity of their prior convictions and came up with a framework for adjudicating such claims. On federal habeas, the Sixth Circuit declared that the Kentucky system did "not comply with federal standards," *Dunn* v. *Simmons*, 877 F. 2d 1275, 1279 (CA6 1989), and this Court denied certiorari. 494 U. S. 1061 (1990). Years later, in a different case, this Court decided that the Kentucky system "*easily* passes constitutional muster." *Parke* v. *Raley*, 506 U. S. 20, 28 (1992) (emphasis added). The state court judgment in *Dunn* had been wrongly set aside. The state court was not only right, according to the final authority, it was right by a wide margin.

On the complex questions of constitutional criminal procedure, "right" and "wrong" in the abstract are very often debatable. We must operationally define the "right" answer as the answer given by the court of last resort.

"Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be

reversed. We are not final because we are infallible, but we are infallible only because we are final." *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the judgment).

Until this Court renders its answer, other courts will disagree. In the vast majority of cases, then, the real question is not what to do about "incorrect" state court judgments, cf. *Williams* v. *Taylor*, 529 U. S. 362, 411 (2000), but rather what to do with a state court judgment on an unresolved question with which the federal court might disagree.

From *Brown* v. *Allen* until the AEDPA, the answer was that the federal court simply substituted its own judgment for that of the state court, subject to limitations such as retroactivity and procedural default. See Scheidegger, *supra*, 98 Colum. L. Rev., at 933, 939-940. Congress quite deliberately changed that rule, creating "a new constraint." *Williams*, 529 U. S., at 412. The premise of the change was a renewed respect for state courts. See 141 Cong. Rec. 15,062, col. 2 (1995) (statement of Sen. Hatch). Their judgments are no longer to be brushed aside as virtual nullities. In developing the rules to implement this important reform, the federal courts should keep these twin objects in mind. An implementation which further delays habeas cases or which leaves correct state judgments exposed to erroneous nullification by the district and circuit courts would be contrary to the intent of Congress.

II. The AEDPA issue should be resolved first, as a "threshold matter."

Before we address the merits of the case, there is an important methodology question which has divided the circuits. Should a court addressing an issue subject to 28 U. S. C. § 2254(d)(1) decide whether petitioner's claim meets the criteria of that section first, or should it go to the merits of the underlying question first and only address the statutory standard if it disagrees with the state court's conclusion? Compare *Tran*

v. *Lindsey*, 212 F. 3d 1143, 1154-1155 (CA9 2000), cert. denied, 531 U. S. 944 (2000) (sometimes cited as "*Van Tran* v. *Lindsey*"), with *Bell* v. *Jarvis*, 236 F. 3d 149, 161-162 (CA4 2000) (en banc) (criticizing *Tran*). The difference between the two approaches may not matter much in this individual case, but multiplied over the tens of thousands of habeas cases per year, it is important. See U. S. Dept. of Justice, Bureau of Justice Statistics, Prisoner Petitions Filed in U. S. District Courts, 2000, with Trends 1980-2000, p. 2 (NCJ 189430 2001).

This Court has addressed the order of consideration of claims in several different contexts. Resolvability of a claim on one ground may make the answering of another question unnecessary, undesirable, improper, or even illegitimate. Jurisdiction goes to the head of the line, for without jurisdiction there is no legitimate authority to decide anything else. See *Steel Co.* v. *Citizens For Better Environment*, 523 U. S. 83, 94, 101-102 (1998). There is also a venerable rule that a case should be resolved on nonconstitutional grounds if the constitutional question, and hence potential or actual conflict with the legislative branch, can be avoided. See *Liverpool, New York, and Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885).

In habeas cases, the usual order is to decide "general prerequisites" such as custody, exhaustion, and procedural default first, see *Lambrix* v. *Singletary*, 520 U. S. 518, 524 (1997), although Congress has authorized an exception for the dismissal on the merits of meritless but unexhausted applications. See 28 U. S. C. § 2254(b)(2). The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) follows these determinations but precedes the underlying question. See *Lambrix*, *supra*, at 524; *Penry* v. *Lynaugh*, 492 U. S. 302, 329 (1989) ("threshold matter"). The first question in the present case is where the § 2254(d) issue is to be resolved.

There is a substantial overlap between the analysis needed to resolve a § 2254(d)(1) issue and a *Teague* issue. See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000) (comparing

Teague "old rule" with § 2254(d)(1) "clearly established"). This overlap suggests an efficiency in addressing these two issues consecutively, before the underlying question. If the claim is barred by either or both rules, there will be no need to address the "merits" of the petitioner's claim.

The practical appeal of this approach is reinforced by both jurisprudential considerations and respect for the intent of Congress. The reason why *Teague* is a threshold matter is that announcing a new rule in a case where the rule does not affect the outcome would be an advisory opinion. See *Teague*, 489 U. S., at 316 (plurality opinion). That is, once a court decides that petitioner's proposed rule is new and does not qualify for an exception, the question of whether the rule ought to be adopted has no effect on the outcome of the case before the court. Courts have legitimate authority to make law, especially constitutional law, only in the course of deciding cases. See *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 177-178 (1803); *Muskrat* v. *United States*, 219 U. S. 346, 360-361 (1911); 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 2.13(b), p. 177 (2d ed. 1999). Once the court decides under *Teague* that the petitioner would not be entitled to relief even if he were right on the "merits," its legitimate precedent-making authority ends.

In this sense, § 2254(d)(1) is the same kind of rule as *Teague*. Where it applies, it precludes collateral relief regardless of the validity or invalidity of the underlying claim. This issue, like *Teague*, should therefore be addressed as a threshold matter.

Respect for the intent of Congress and the purpose of the AEDPA also favors this approach. The central purpose of the statute, voiced uniformly by its supporters, is to reduce the unconscionable delays in habeas corpus, particularly in capital cases. See *supra*, at 6. Specifically addressing § 2254(d), Senator Hatch, the provision's principal sponsor, noted "Federal habeas corpus proceedings have become, in effect, a second round of appeals in which convicted criminals are

afforded the opportunity to *relitigate* claims already considered and rejected by the state courts." 141 Cong. Rec. 15,062, col. 2 (1995) (emphasis added); see also K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform 27-28 (1995), http://www.cjlf.org/publctns/Overdue/ODCover.htm.

In *Williams*, Justice Stevens acknowledged that "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." 529 U. S., at 386 (opinion of Stevens, J.). "That acknowledgment is correct and significant to this case. It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Id.*, at 404 (majority opinion).

For § 2254(d)(1) to achieve its purpose, it is not enough to preclude relief; it must preclude relitigation. The state's primary interest in habeas reform was not to block relief in cases where it is warranted. Rather, it was to reduce the "burden of federal relitigation of state decisions . . . ." S. O'Connor, Local Control of Crime, Address to the Attorney General's Crime Summit 5 (Mar. 4. 1991), reprinted in Habeas Corpus Issues: Hearings before the House Subcommittee on Civil and Constitutional Rights, Serial No. 39, 102d Cong., 1st Sess., at 192, 197 (1991). In habeas, as in immunity, once the respondent is forced to litigate the question, most of the value of the protection is lost. Cf. *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985).

Determining whether another court's decision is within reason is typically much easier and faster than deciding the underlying question *de novo*. The doctrine of law of the case, as applied to decisions of coordinate courts, is analogous to § 2254(d). See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 914-916, 953 (1998). In that context, this Court admonished the courts of appeals not to "squander private and public resources." *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800,

818-819 (1988). Instead, once the second court finds the first court's decision "plausible, its . . . inquiry is at an end." *Id.*, at 819.

Penry v. *Johnson*, 532 U. S. 782, 150 L. Ed. 2d 9, 121 S. Ct. 1910 (2001), illustrates the application of § 2254(d)(1) as a threshold question. After discussing the differences between Penry's case and the precedent he was relying on, the Court held, "We need not and do not decide whether these differences affect the merits of Penry's Fifth Amendment claim. Rather, the question is whether the Texas court's decision was contrary to or an unreasonable application of our precedent. 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. V). We think it was not." *Id.*, 150 L. Ed. 2d, at 23-24, 121 S. Ct., at 1919. An opinion resolving the merits of the Fifth Amendment claim would have required a more detailed analysis. Penry's habeas claim could be disposed of simply by noting that the differences from the precedent were sufficient that the state court's resolution of the claim was reasonable.

On Penry's second claim, the Court's holding that the state court decision was an unreasonable application also resolved the merits. See *id.*, 150 L. Ed. 2d, at 29-30, 121 S. Ct., at 1924. An unreasonable decision is necessarily a wrong decision. Cf. *Weeks* v. *Angelone*, 528 U. S. 225, 237 (2000) (correct decision is necessarily reasonable). In no case, then, is a two-step analysis necessary. In that vast majority of cases where the state court decision is reasonable, relief is denied. In those very few cases where it is unreasonable, and other prerequisites to reaching the merits have been satisfied, relief is granted.

Tran v. *Lindsey*, *supra*, offered three reasons for deciding the underlying question first. None is persuasive. First, *Tran* noted that *Weeks* v. *Angelone*, *supra*, decided first that the state court decision was correct, and only then addressed the AEDPA limitation. See *Weeks*, 528 U. S., at 237; *Tran*, 212 F. 3d, at 1155. The obvious reason is that *Williams* v. *Taylor*, *supra*, was pending but not decided at the time, and decision in this

order avoided the not-yet-resolved issue of the § 2254(d)(1) standard. That reason no longer applies.

The second reason was a reference to the qualified immunity cases. *Tran*, 212 F. 3d, at 1155. In this aspect, however, there is an important distinction between the qualified immunity cases and § 2254(d)(1). In civil rights suits alleging police misconduct, there is a need to establish a precedent to guide police actions in the future. In such suits, typically there is no prior court decision.[2] "The law might be deprived of this explanation [of the existence or nonexistence of a constitutional right] were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." *Saucier* v. *Katz*, 533 U. S. 194, 150 L. Ed. 2d 272, 281, 121 S. Ct. 2151, 2156 (2001). However, in a case to which § 2254(d) applies, there has already been a ruling on the merits by a court of competent jurisdiction. Further, a ruling on the merits by a district or circuit court cannot set a precedent "clearly establish[ing]" the law for future state-court cases, as Congress has expressly limited the body of binding precedent to this Court's decisions. Compare 28 U. S. C. § 2254(d), with *United States* v. *Lanier*, 520 U. S. 259, 268 (1997) ("fair warning" in criminal civil rights cases not limited to this Court's precedents); *id.*, at 270-271 (similarity of civil and criminal standards).

Even so, *Tran* opined that a resolution of the merits would "provide[ ] guidance for state courts . . . ." 212 F. 3d, at 1155. In the federal courts of appeals, where most habeas cases will end, this "guidance" is not worth the delay, expense, and dubious legitimacy of writing opinions on points which do not affect the outcome. The opinions are not binding on state courts. See *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997); *id.*, at 66, n. 21; *Lockhart* v. *Fretwell*,

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2. If a state court actually had decided the merits adversely to the plaintiff, the suit would be precluded by collateral estoppel. See *Allen* v. *McCurry*, 449 U. S. 90, 104-105 (1980).

506 U. S. 364, 375-376 (1993) (Thomas, J., concurring). There is certainly no shortage of case law on constitutional criminal procedure. Questions bypassed on habeas can be considered in due course on direct review. See, *e.g.*, *Holland* v. *Illinois*, 493 U. S. 474, 486 (1990) (resolving issue left open in *Teague*). The federal courts of appeals "have no reason to presume state courts are in need of [their] guidance in interpreting and applying the controlling Supreme Court precedents." *Bell* v. *Jarvis*, 236 F. 3d 149, 162 (CA4 2000). *Tran*'s mandate to write pointless opinions sends an unfortunate and incorrect message that federal courts do not have enough to do. Cf. *Watt* v. *Alaska*, 451 U. S. 259, 274 (1981) (Stevens, J., concurring). It should be expressly disapproved. As a general rule, a habeas court should ask whether relief is precluded by § 2254(d) before addressing the merits of the underlying question. If relief is precluded, analysis can and should stop there.

III. There is no need for a separate "extension" analysis under the "unreasonable application" prong of § 2254(d)(1).

The "unreasonable application" prong of 28 U. S. C. § 2254(d)(1) generally involves the state court's application of "the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case . . . ." See *Williams* v. *Taylor*, 529 U. S. 362, 406 (2000). *Williams* also noted that the Fourth Circuit, in *Green* v. *French*, 143 F. 3d 865 (1998) had held that "a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, *supra*, at 407. *Williams* expressly reserved the question whether *Green*'s " 'extension of legal principle' " analysis was correct. See *id.*, at 408-409. The plurality opinion in *Ramdass* v. *Angelone*, 530 U. S. 156, 166 (2000) included it in its

summary of *Williams*' holding, but *Penry* v. *Johnson*, 532 U. S. 782, 150 L. Ed. 2d 9, 22, 121 S. Ct. 1910, 1918 (2001) omitted it. The passing mention in dictum in *Ramdass* seems insufficient to resolve a question expressly reserved in *Williams*, and the question should be regarded as unresolved to this point. *Amicus* CJLF submits that the "extension of legal principle" prong of *Green* is unnecessary and would serve only to complicate the analysis.

Common to both the "contrary to" and "unreasonable application" prongs of § 2254(d)(1) is the requirement that the rule in question be "clearly established." For the most part, "whatever would qualify as an old rule under our *Teague* [v. *Lane*, 489 U. S. 288 (1989)] jurisprudence will constitute 'clearly established Federal law . . .' under § 2254(d)(1)." *Williams*, 529 U. S., at 412; see also *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990) (using "clearly established" in *Teague* context). This *Teague*-like inquiry includes the question of whether a preexisting precedent applies to the context of the present case.

In *Butler* v. *McKellar*, 494 U. S. 407 (1990), the state court was confronted with the question of whether the rule of *Edwards* v. *Arizona*, 451 U. S. 477 (1981) applied to a police request for waiver of *Miranda* rights for a different offense, when the suspect had already invoked his rights for the offense for which he had been arrested. See *Butler*, at 410-411. The question was debatable at the time of the state decision, *id.*, at 415, and the subsequent extension of *Edwards* to this context was therefore a "new rule." In § 2254(d)(1) terms, there was no "clearly established Federal law" governing the different-offense situation, although the law governing the same-offense situation had been clearly established in *Edwards*. Similarly, in *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994), no Supreme Court precedent established that the Double Jeopardy Clause applied to noncapital sentencing, and the extension of *Bullington* v. *Missouri*, 451 U. S. 430 (1981) from the capital context to noncapital would have been a new rule. See also *Gilmore* v.

Taylor, 508 U. S. 333, 350 (1993) (extension of *Winship* line would have been a new rule).

Williams itself provides the example of a case granting relief. The Virginia Supreme Court had extended the rule of *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993) to a new context where it should not apply. *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984) had generally defined "prejudice" for ineffective assistance claims as a "reasonable probability that . . . the result of the proceeding would have been different." *Lockhart* had recognized an exception where the allegedly deficient performance "does not deprive the defendant of any substantive or procedural right to which the law entitles him," 506 U. S., at 372, an exception noted in *Strickland* itself. See 466 U. S., at 695 ("no entitlement to the luck of a lawless decisionmaker"). But *Williams* involved the jury's consideration of mitigating evidence, see 529 U. S., at 415, a procedural right to which Williams *was* entitled. Hence, the state court had both extended *Lockhart* to a context where it should not reach and failed to apply the general rule of *Strickland* in a context where it does apply. This error was "contrary to that clearly established federal law . . . ." *Williams*, *supra*, at 413 (opinion of O'Connor, J.). A separate "unreasonable application" inquiry was not necessary in *Williams*, and it would not be necessary in any case where the "extension of legal principle" analysis would properly result in a grant of relief. The statement of the *Williams* rule in *Penry*, 150 L. Ed. 2d, at 22, 121 S. Ct., at 1918, should be confirmed as a complete statement of the required analysis.

IV. The state courts recognized and applied the correct rule.

On Cone's motion for postconviction relief, the state trial court correctly recognized *Strickland* v. *Washington*, 466 U. S. 668 (1984) and the then-recent decision in *Darden* v. *Wainwright*, 477 U. S. 168 (1986), as establishing the governing

rule. See Findings of Fact and Conclusions of Law 5-6, J. A. 84. The court also referred to *Baxter* v. *Rose*, 523 S. W. 2d 930 (Tenn. 1975), a pre-*Strickland* case in which the Tennessee Supreme Court followed the tests adopted in the Sixth and D.C. Circuits. See *id.*, at 936. These pre-*Strickland* circuit cases are not significantly different from *Strickland* on the performance standard. See *Strickland*, *supra*, at 696-697. The trial court found that counsel's performance was not deficient. Findings, *supra*, at 6, J. A. 84. The court therefore did not need to address the prejudice component, see *Strickland*, *supra*, at 697, and it did not.

On appeal, the Tennessee Court of Criminal Appeals cited *Strickland* as the standard for the prejudice requirement. *Cone* v. *State*, 747 S. W. 2d 353, 356 (1987). The court found both that counsel was not deficient and that "the findings of guilt and the imposition of the death penalty were based upon the facts and the law—not by shortcomings of counsel." *Id.*, at 357-358. Although not expressly stated, it is evident that the state court believed that the *Strickland* prejudice requirement applies to the circumstances of the present case.

Strickland established a general rule that "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." 466 U. S., at 693. Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. Exceptions to this requirement are few and far between. There is a small class of cases where a showing of a different outcome is insufficient. See *Nix* v. *Whiteside*, 475 U. S. 157, 175 (1986) (client perjury); *Lockhart* v. *Fretwell*, 506 U. S. 364, 370-371 (1993) (legal argument now known to be erroneous); *Strickland*, 466 U. S., at 695 (jury nullification). The common principle underlying these cases is that a client has no right to a lawyer who will cause the system to malfunction in his favor.

The other group of cases are those where a showing of a different result is not required. They include complete denial of counsel, conflict of interest, and state interference with counsel. *Strickland*, *supra*, at 692. Claims that the attorney has erred are different in kind, not just in degree, from those identified as exceptions to the general rule. The *Strickland* Court flatly refused to classify attorney errors "according to the likelihood of causing prejudice." *Id.*, at 693. *Darden* v. *Wainwright*, 477 U. S. 168, 184 (1986), the last pertinent Supreme Court precedent before the state court decision in this case, applied the two-part *Strickland* standard to a case where defense counsel did not present any evidence in mitigation other than "a simple plea for mercy from petitioner himself." *Id.*, at 186. Far from being "clearly established" that the prejudice prong of *Strickland* did not apply to an attorney's considered decision to not introduce mitigating evidence or make a closing argument, it appeared to be clearly established that the requirement *did* apply.

The status of a rule as not "clearly established" may be confirmed by later cases pointing the other direction. Cf. *Lambrix* v. *Singletary*, 520 U. S. 518, 536 (1997) (use of later case to confirm "new rule" status); *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994) (later cases relevant to "limited extent"). *Smith* v. *Robbins*, 528 U. S. 259 (2000) presented a far stronger argument for presumed prejudice than does the present case. Robbins' appellate attorney did not make any argument at all on his behalf. See *id.*, at 265, 267. However important closing argument may be to a penalty trial, waiver of it does not come close to the complete absence of argument in *Robbins*. Yet the Court rejected a presumption of prejudice and required Robbins to prove it. *Id.*, at 286-287.

No clearly established rule makes an exception to *Strickland* under the facts of the present case. *Strickland*'s two-prong test is therefore the clearly established law for both the "contrary to" and "unreasonable application" prongs of § 2254(d)(1). The state court's decision is not contrary to *Strickland*. A federal

habeas court may not sustain a collateral attack on the state court judgment unless, applying *Strickland*'s rule to the facts of the present case, a decision against the defendant would be unreasonable.

V. If the application of the law to the facts is reasonably debatable, the state court decision stands.

"Habeas corpus 'is designed to guard against *extreme malfunctions* in the state criminal justice systems.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 634 (1993) (emphasis added) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in the judgment)). This Court has said many times that habeas is different from an appeal from the judgment of conviction. See *id.*, at 633 (collecting cases). Its role is "secondary and limited." *Ibid.* (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983)). Section 2254(d) recognizes the limited purpose of habeas. When the state courts have considered the appellant's claim, recognized the correct rule of law, applied that rule to the facts of the case, and reached a conclusion within the range of reasonable disagreement, there has been no extreme malfunction of the system.

Although the present case has reached the Supreme Court, most cases do not. In most federal habeas cases, the final decision will be made by a three-judge panel of the court of appeals. When that panel disagrees with the decision of the state court, one of those decisions must be wrong, but no simple rule tells us which one. See *supra*, at 7. When a federal district or circuit court grants habeas relief to a state prisoner, it might be correcting an erroneous state decision, or it might be erroneously nullifying a correct decision. See *supra*, at 7. In 28 U. S. C. § 2254(d)(1), Congress sought to deal with this uncertainty, as well as to expedite the processing of habeas cases. See part I, *supra*.

As the *Williams* Court noted, "The term 'unreasonable' is no doubt difficult to define." *Williams* v. *Taylor*, 529 U. S.

362, 410 (2000). Some definition is needed, however, if the standard is going to be applied with any degree of uniformity. The definitions must be chosen with care, as some formulations in the courts of appeals, if taken literally, would come close to a judicial repeal of the statute. *Tran* v. *Lindsey*, 212 F. 3d 1143, 1153 (CA9 2000), for example, stated that a "firm conviction" that the state court decision was incorrect was sufficient for a collateral attack on a final judgment. Yet the federal court being "convinced" on the merits is exactly the standard the *Williams* majority rejected because it would have given "the 1996 amendment no effect whatsoever." 529 U. S., at 403. The addition of the adjective "firm" would give state judgments little additional protection. Cf. *Maynard* v. *Cartwright*, 486 U. S. 356, 364 (1988).

Congress deliberately chose the word "unreasonable," see *Williams*, *supra*, at 411, and "unreasonable" is a strong word. It means "[n]ot guided by reason; irrational or capricious." Black's Law Dictionary 1537 (7th ed. 1999). The *Williams* Court's rejection of a subjective standard for an objective one should not be misinterpreted as a watering down of this stringent limitation. "Objective legal reasonableness" is the criterion of the qualified immunity line of cases, see *Behrens* v. *Pelletier*, 516 U. S. 299, 306 (1996); *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982), yet that standard "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986). Similarly, § 2254(d) is a "new, *highly deferential* standard for evaluating state-court rulings." *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7 (1997) (emphasis added).

There are other connections between § 2254(d) and the immunity cases. The statutory term "clearly established" appears to be lifted from them. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 947 (1998). Both rules are intended to enable courts to more quickly dispose of suits against govern-

ment officials. See *Behrens*, 516 U. S., at 305-306; *Williams*, 529 U. S., at 404; see also part I, *supra*.

United States v. *Leon*, 468 U. S. 897 (1984) similarly adopted an objective reasonableness test for suppression of evidence obtained with a search warrant, citing *Harlow*. *Id.*, at 922-923. Applying the general rule of probable cause to the specific facts of the individual case, the fruits of the search will not be suppressed if the evidence before the issuing magistrate is "sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." *Id.*, at 926. There is no inconsistency between the objectivity requirement that *Williams* found in this statute and the "highly deferential" characterization of it in *Lindh*. In the Senate floor debate on § 2254(d), both the principal sponsor and the principal opponent referred to *Leon* in their discussion of the meaning of the "unreasonable application" prong. See 141 Cong. Rec. 15,064, col. 2 (1995) (statement of Sen. Hatch); *id.*, at 15,059, col. 3 (statement of Sen. Biden).

Saucier v. *Katz*, 533 U. S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001) illustrates the use of an objective standard of reasonableness in evaluating an application to specific facts of a general rule of law with a "sometimes 'hazy border.' " *Id.*, 150 L. Ed. 2d, at 284, 121 S. Ct., at 2158. "The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards." *Id.*, 150 L. Ed. 2d, at 285, 121 S. Ct., at 2159. A court need not agree with that understanding; "substantial grounds" for the officer's conclusion are sufficient. *Id.*, 150 L. Ed. 2d, at 286, 121 S. Ct., at 2159.

Some applications are patently unreasonable even without a case on or near the point. See *United States* v. *Lanier*, 520 U. S. 259, 271 (1997) (selling children into slavery). However, the more general the standard and the further one gets from the core of constitutional rights, the broader the zone of reasonable disagreement.

In *Wright* v. *West*, 505 U. S. 277, 308 (1992), Justice Kennedy noted that, in the retroactivity cases, "The comity interest is not, however, in saying that since the question is close the state-court decision ought to be deemed correct because we are in no better position to judge. That would be the real thrust of a principle based on deference." Deference *is* the principle of the new statute, though. "[I]n both houses of Congress section 2254(d) 'was called a "deference" standard by every member who spoke on the question, opponents as well as supporters.' " *Matteo* v. *Superintendent*, 171 F. 3d 877, 890 (CA3 1999) (quoting Scheidegger, *supra*, 98 Colum. L. Rev., at 945); see 141 Cong. Rec. 15,057, col. 2 (1995) (statement of Sen. Biden); *id.*, at 15,062, col. 3 (statement of Sen. Hatch). Its real thrust is indeed that "State courts, in many respects, are just as good, if not better, than the Federal courts in these areas, just as good." 141 Cong. Rec. 15,062, col 2 (1995) (statement of Sen. Hatch). Congress's concern was primarily with the district and circuit courts rather than this Court, as indicated by the limitation on the definition of clearly established federal law, but the same standard must be applied in cases that arrive here through § 2254. This Court retains the authority to review state court decisions *de novo* under 28 U. S. C. § 1257.

Although *Williams* rejected reference to "all reasonable jurists" as the standard, 529 U. S., at 410, it did not reject the whole *Teague* line of cases as an analogous inquiry. Indeed, *Williams* refers to Justice O'Connor's clarification of the *Teague* line in *Wright* for its objective standard. See *ibid.* *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990) asked whether the question was "susceptible to debate among reasonable minds . . . ." That remains the standard under *Teague*, and it translates easily to the reasonableness inquiry required by the new statute, so long as it is understood that the inquiry is an objective one. It is consistent with *Harlow*, *Leon*, and their broad latitude for what a reasonable officer could have believed was the limit of his authority.

A standard of susceptibility to debate among reasonable minds is stringent enough, if properly applied, to achieve Congress's objectives, while still allowing relief for those "few indeed . . . whom society has grievously wronged . . . ." *Fay* v. *Noia*, 372 U. S. 391, 440-441 (1963), overruled on other grounds, *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991). The frontiers of constitutional criminal procedure have been pushed so far from the original Bill of Rights that any state decision that really did violate a fundamental right, see *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting), would necessarily be outside the zone of reasonable debate. That zone consists entirely of non-fundamental, court-created rules of relatively recent vintage.

When the normal appellate process concludes with a decision within the zone "susceptible to debate among reasonable minds," it has "resulted in a ' "satisfactory conclusion." ' " See *Williams*, 529 U. S., at 410 (quoting *Wright* v. *West*, 505 U. S., at 287, in turn quoting *Brown* v. *Allen*, 344 U. S. 443, 463 (1953)). There has been no "extreme malfunction[ ]," see *supra*, at 19, which would warrant the drastic remedy of collateral attack on a final judgment. The federal district and circuit courts are not "higher" courts above the state courts in the appellate hierarchy. See Scheidegger, *supra*, 98 Colum. L. Rev., at 898-900. Congress's stringent limitation on habeas is consistent with its policy in other areas of preventing the lower federal courts from exercising *de facto* appellate jurisdiction over state courts, see *id.*, at 900-903, reserving that role to this Court alone. See *Darr* v. *Burford*, 339 U. S. 200, 217 (1950), overruled on other grounds, *Fay* v. *Noia*, 372 U. S., at 435.

Before *Williams*, the First Circuit interpreted the "unreasonable application" prong as authorizing relief when the state court decision "is outside the universe of plausible, credible outcomes." *O'Brien* v. *Dubois*, 145 F. 3d 16, 25 (1998). That court has since reaffirmed that the *O'Brien* formulation is "congruent" with *Williams* v. *Taylor*. See *Williams* v. *Mate-*

sanz, 230 F. 3d 421, 423 (2000). It is substantially the same as the *Butler* standard we propose.

The Second Circuit has stated that "to permit habeas relief . . . [s]ome increment of incorrectness beyond error is required," but "that increment need not be great; otherwise, habeas relief would be limited to state court decisions 'so far off the mark as to suggest judicial incompetence.' " *Francis S.* v. *Stone*, 221 F. 3d 100, 111 (2000). It is not entirely clear what this opinion means by "not great." If it means that Congress only nudged the benchmark a few millimeters from *de novo* relitigation, that interpretation cannot be squared with the language, history, or purpose of the statute. As noted, *supra*, at 20, Congress deliberately chose the strong word "unreasonable." Section 2254(d) was the centerpiece of a landmark reform intended to have a major impact on the way federal courts treat habeas cases. Cases in which a state court judgment is successfully collaterally attacked in federal court *should* be "few indeed," see *supra*, at 23, and there is no merit to an objection that the statute will actually limit relief to few cases.

There are reasons other than judicial incompetence why a decision may be so far off the mark as to be unreasonable. As *Williams* v. *Taylor* illustrates, a court's application of a rule may be skewed by a misunderstanding of the rule. "It is impossible to determine . . . the extent to which the Virginia Supreme Court's error with respect to its reading of *Lockhart* affected its ultimate finding that *Williams* suffered no prejudice." 529 U. S., at 414. In an overloaded judicial system, it is also possible that an unreasonable application may result from a failure to give the case sufficient attention. Justice Jackson noted nearly half a century ago that "floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts," and "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown* v. *Allen*, 344 U. S., at 536-537 (opinion concurring in the judgment). The situation has certainly not improved since then. If the inundated state court overlooks the needle in the haystack,

see *id.*, at 537, despite the undisputable merit of the petition, then § 2254(d)(1) still permits federal habeas relief.

In the present case, the Sixth Circuit made only a terse mention of § 2254(d)(1). *Cone* v. *Bell*, 243 F. 3d 961, 979 (2001). This mention followed the court's novel and probably erroneous expansion of the "presumed prejudice" cases. See *supra*, part IV. The question at this point should have been whether, applying both prongs of the clearly established *Strickland* rule to the facts of this case, a decision against the petitioner was unreasonable, *i.e.*, whether his entitlement to relief was so clear as to not be "susceptible to debate among reasonable minds." For the reasons stated in the state's brief and the briefs of the other *amici*, the state court decision was reasonable and § 2254(d)(1) precludes collateral attack on that judgment.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed.

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Respectfully submitted,

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